Order

Michigan Supreme Court
Lansing, Michigan

March 18, 2009

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

ADM File No. 2009-04

PROPOSALS REGARDING
PROCEDURE FOR DISQUALIFICATION
OF SUPREME COURT JUSTICES

On order of the Court, this is to advise that the Court is considering the following alternative proposals, and variations thereof, regarding the disqualification of Supreme Court justices. Before determining whether one of the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.mi.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of any of the proposals in their present form.

[In Alternative C, additions are indicated by underlining and deletions are indicated by strikeover.]

ALTERNATIVE A (proposed new Rule 2.003-SC of the Michigan Court Rules)

Rule 2.003-SC Disqualification of a Justice

Unless one of the conditions specified below is met, it is the duty of a justice to serve in every case and a justice is not mandatorily required to withdraw from serving on a case. Each justice shall, on motion or sua sponte, decide whether grounds exist for his or her disqualification in a particular case. Disqualification of a justice is required if:

(1) The justice is actually biased against or for a party in the proceeding.

(2) The justice has personal knowledge of disputed evidentiary facts concerning the proceeding.

(3) The justice has been consulted or employed as an attorney in the matter in controversy.

(4) The justice was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(5) The justice knows that he or she, individually or as a fiduciary, or the justice's spouse, parent, or child wherever residing, or any other member of the justice's family residing in the justice's household, has a more than de minimis economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

(6) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the justice to have a more than de minimis interest that could be substantially affected by the proceeding; or

(d) is to the justice's knowledge likely to be a material witness in the proceeding.

A justice is not disqualified merely because the justice's former law clerk is an attorney of record for a party in an action that is before the justice or is associated with a law firm representing a party in an action that is before the justice.

ALTERNATIVE B (proposed new Rule 2.003-SC of the Michigan Court Rules)

Rule 2.003-SC Disqualification of a Justice

(A) Who May Raise. A party may raise the issue of a justice's disqualification by motion, or any justice may raise it.

(B) Grounds for Disqualification. Disqualification of a justice is warranted if:

(1) The justice is actually biased or prejudiced against or for a party in the proceeding.

(2) The justice's impartiality might objectively and reasonably be questioned. Statements or conduct by anyone other than the justice shall not be considered in assessing the impartiality of a justice, nor shall campaign speech protected by *Republican Party of Minnesota v White,* 536 US 765;

122 S Ct 2528; 153 L Ed 2d 694 (2002), be a proper basis for the disqualification of a Justice.

(3) The justice has personal knowledge of disputed evidentiary facts concerning the proceeding.

(4) The justice has been consulted or employed as an attorney in the matter in controversy.

(5) The justice was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(6) The justice knows that he or she, individually or as a fiduciary, or the justice's spouse, parent, or child wherever residing, or any other member of the justice's family residing in the justice's household, has a more than de minimis economic or other interest in the subject matter in controversy.

(7) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is acting as a lawyer of record in the proceeding;

(c) is known by the justice to have a more than de minimis interest that could be substantially affected by the proceeding; or

(d) is to the justice's knowledge likely to be a material witness in the proceeding.

A justice is not disqualified merely because a former law clerk of the justice is an attorney of record for a party in an action that is before the Court or is associated with a law firm representing a party in an action that is before the Court.

(C) Procedure.

(1) *Time for filing.* A party must file a motion to disqualify a justice within 14 days after the moving party discovers or should have discovered the basis for disqualification. If a motion is not timely filed, untimeliness is a factor in deciding whether the motion should be granted. A justice may raise a

question of disqualification at any time a potential justification for so doing arises.

(2) *All grounds to be included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling.* The challenged justice shall decide the motion for disqualification. If the challenged justice denies the motion for disqualification, the moving party may appeal to the Chief Justice, who shall decide the motion de novo. If the challenged justice is the Chief Justice, and the motion for disqualification is denied, the moving party may appeal to the entire Court, which shall decide the motion de novo.

(4) *Motion Denied.* If the Chief Justice denies the motion for disqualification, the Chief Justice shall issue an order to that effect without elaboration. If the challenged justice is the Chief Justice, and the Court denies the motion for disqualification, the Court shall issue a denial order without elaboration. No other additional statements are permitted.

(5) *Motion Granted.* When a justice is disqualified, the proceeding will be decided by the remaining justices of the Court.

ALTERNATIVE C

Rule 2.003 Disqualification of Judge

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(B~~A~~) Who May Raise. A party may raise the issue of a judge's disqualification by motion~~,~~ or the judge may raise it.

(C~~B~~) Grounds. ~~A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:~~

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a~~1~~) The judge is actually~~personally~~ biased or prejudiced for or against a party or attorney.

(b) The judge's impartiality might objectively and reasonably be questioned.

(c~~2~~) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d~~3~~) The judge has been consulted or employed as an attorney in the matter in controversy.

(e~~4~~) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f~~5~~) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has a~~n~~ more than de minimis economic or other interest in the subject matter in controversy. ~~or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.~~

(g~~6~~) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i~~a~~) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii~~b~~) is acting as a lawyer in the proceeding;

(iii~~c~~) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or

(iv~~d~~) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification of a judge is not warranted~~A judge is not disqualified~~ merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(D~~C~~) Procedure.

(1) *Time for Filing*. To avoid delaying trial and inconveniencing the witnesses or delaying the appellate process, a motion to disqualify must be filed within 14 days after the moving party discovers or should have discovered the ground for disqualification. In the trial court, if~~If~~ the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including, in the trial court, delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

(2) *All Grounds to be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling.*

(a) For courts other than the Supreme Court, ~~T~~the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i~~a~~) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii~~b~~) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification.

(4) *Motion Granted.*

(a) For courts other than the Supreme Court, w~~W~~hen a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the proceeding will be decided by the remaining justices of the Court.

(E~~D~~) Remittal of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. In the Court of Appeals and the Supreme Court, the clerk of the court may contact the parties with a written explanation of the possible grounds for disqualification. If, following disclosure of any basis for disqualification other than actual~~personal~~ bias or prejudice concerning a party, the parties, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.

WEAVER, J. (*concurring*). Below, in its entirety, is the statement I submitted to be published in 2006 when this Court first voted to publish for comment the proposed court rules concerning the participation or disqualification of Michigan Supreme Court Justices. My statement includes bracketed material on pages 14 and 19 that represents my 2009 editorial comments concerning the duty of a justice to participate in a case pursuant to the common-law rule of necessity doctrine. My statement also includes an important CHART on page 18 that provides a comparison of each of the proposed rules to the existing court rule, MCR 2.003.

Although my statement contains references to 2006 statements of other justices, as yet not re-submitted, I have chosen to retain those references because they provide necessary context for understanding my views on the participation and disqualification of justices. In addition, I note that while Justice Corrigan has not re-submitted her 2006 statement on disqualification, she and Justice Young have submitted 2009 statements for this order in which they re-assert the argument that there is a so-called historic unwritten practice or tradition in Michigan similar to that of the United States Supreme Court, sometimes called a federal "duty to sit." Further, Justices Corrigan and Young re-assert the argument that justices cannot be replaced by other judicial officers.

Michigan Constitution, art 6, § 23 provides:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which

> election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

Art 6, § 23 is the constitutional authority that allows, but does not require, the Supreme Court, as it has done in the past and continues to do so today, to "authorize persons who have been elected and served as judges [i.e., current and retired trial judges, Court of Appeals judges, and Supreme Court Justices who have been elected and served as judges] to perform judicial duties for limited periods or specific assignments" in the trial courts and the Court of Appeals when illness, disqualification, recusal, or other temporary occurrence or need prevents judicial duties from being performed by trial or Court of Appeals judges.

As I have stated before, I do not suggest that our Michigan Constitution, art 6, § 23, *requires* this Supreme Court to authorize a person who has been elected and has served as a judge to perform judicial duties for limited periods or specific assignments every time an illness, disqualification, or other temporary occurrence prevents judicial duties from being performed by a justice, but rather art 6, § 23 provides for and thus *allows* this Court to do so when, in the exercise of its sound discretion, doing so is necessary. None of the three proposals (A, B, and C drafted in 2006) submitted for public comment address the application of art 6, § 23 to the disqualification or recusal of justices issue.

For those interested in even more information and the history behind the disqualification issue, see my personally funded website at **www.justiceweaver.com**. My website includes my dissent in *Grievance Administrator v Fieger,* 477 Mich 1228, 1232 (2006)—in which I published my 2006 disqualification statement. My dissent in *Grievance Administrator v Fieger* was ordered suppressed on December 6, 2006 by the then-majority of four (then-Chief Justice Taylor and Justices Corrigan, Young, and Markman) and remained suppressed for 15 days until December 21, 2006.

In addition to the ideas presented in my reproduced 2006 statement, I note that we are only just beginning this important process of discerning court rules for the participation or disqualification of Michigan Supreme Court Justices. For example, one addition to be considered for inclusion in a court rule is whether a justice must disclose any prior attorney-client relationship between the justice and a party, or an attorney for the party, appearing before the court *regardless of how much time has lapsed since the representation*. Another item for consideration might be whether a justice must disclose a monetary contribution exceeding a certain amount and received directly or indirectly from any party or attorney involved the case.

My 2006 statement now follows:

[Weaver, J.]

It is right for this Court to publish for public comment proposed court rules concerning the participation or disqualification of Michigan Supreme Court Justices. Since May 2003, I

have called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the procedures concerning the participation or disqualification of justices.[1]

I strongly encourage the public (citizens, judges, attorneys, and the media) to carefully review the three proposals offered and the current court rule, MCR 2.003, and to comment on them. Public comment, both written and at the public hearing, is essential to achieving clear, fair, orderly, and enforceable rules governing the participation or disqualification of justices. Such rules are essential to maintaining the integrity and independence of the judiciary and the public's confidence in it, particularly the Supreme Court.

I. The Alternative Proposals

I am sincerely interested in receiving written comments and hearing public comment on all the proposals. Because I have thought and worked long on this important issue of the rules governing the disqualification of justices, and because understanding and comparing these three proposals is complicated and potentially confusing, I offer the following list of pertinent questions with discussion and a comparison chart in section II to highlight the distinctions between the proposed alternative rules and the current court rule, MCR 2.003.

These questions and commentary and the comparison chart in section II of this statement, which summarize the substance of the alternative rules, are intended to facilitate informed, candid input from the public (citizens, judges, attorneys and the media) regarding the rules for the participation or disqualification of justices that will best protect the public and the independence and integrity of the judiciary and earn the public's trust and confidence in the Michigan Supreme Court.

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[1] During this Court's deliberations in *In re JK,* 468 Mich 202 (2003), a case involving termination of parental rights, my participation in the case became an issue and led me to research the procedures governing the participation and disqualification of justices. For an explanation of this history, see my statement of non-participation in *In re JK, supra* at 219. Since *In re JK,* I have repeatedly called for this Court to address the need for clear, fair disqualification procedures for justices. See, e.g. *Graves v Warner Bros*, 469 Mich 853, 854-855 (2003), *Gilbert v DaimlerChrysler Corp*, 469 Mich 883, 889 (2003), *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96 (2005), *Harter v Grand Aerie Fraternal Order of Eagles,* 693 NW2d 381 (2005), *Grievance Administrator v Feiger*, 472 Mich 1244, 1245 (2005), *Scalise v Boy Scouts of America*, 473 Mich 853 (2005), *McDowell v Detroit,* 474 Mich 999, 1000 (2006), *Stamplis v St John Health Sys*, 474 Mich 1017 (2006), *Heikkila v North Star Trucking, Inc,* 474 Mich 1080, 1081 (2006), and *Lewis v St John Hosp,* 474 Mich 1089 (2006).

Since May 2003, there have been nine public hearings on other administrative matters in which the rules governing the disqualification of justices could have been addressed: September 23, 2003, January 29, 2004, May 27, 2004, September 15, 2004, January 27, 2005, May 26, 2005, September 29, 2005, January 25, 2006, and May 24, 2006.

1) What form should a rule on the disqualification of Michigan Supreme Court justices take?

Currently, justices of the Michigan Supreme Court sometimes follow unwritten traditions, not always known even to all the justices, when deciding a motion for disqualification. At other times, justices follow portions of the current court rule on disqualification, MCR 2.003.[2] This helter-skelter approach of following "unwritten traditions" that are secret from the public is wrong. There should be clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.

It is important to identify the three actions that may occur after the public hearing on this issue:

● A majority of the justices could decline to commit any new rules to writing and could simply continue to follow secret "unwritten traditions" whenever it so desired. An obvious flaw of "unwritten traditions" is that no one can be sure that an alleged tradition is really a tradition, or that it ever even existed. Further, unwritten traditions can be changed without notice to the public and without public comment.

● A majority of the justices could adopt a proposal, either one of the three published today or some other proposal that was not published for comment, as an unenforceable guideline within the Court's internal operating procedure (IOP). Unlike a court rule, which is binding on the justices and defines the rights of the parties in a case, an IOP is not binding on the justices

[2] There has been inconsistency by some justices regarding the applicability of MCR 2.003 to Supreme Court justices. At times they have applied the rule to themselves, and at times they have not. Indeed, Chief Justice Taylor and Justices Corrigan and Markman have each at times availed themselves of MCR 2.003. In *Adair v Michigan,* 474 Mich 1027, 1043 (2006) Chief Justice Taylor and Justice Markman specifically recognized that they were required to comply with MCR 2.003, stating that "[p]ursuant to MCR 2.003(B) (6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied." [Emphasis added.] Justice Young concurred in their statement, saying that he supported their joint statement and fully concurred in the legal analysis of the ethical questions presented in it. *Id.* at 1053. Similarly, for *Grosse Pointe Park v Michigan Municipal Liability & Prop Pool,* 473 Mich 188 (2005), then-Chief Justice Corrigan used the remittal of disqualification process of MCR 2.003(D). While Justice Corrigan asserts that I have said MCR 2.003(D) is binding, I have not made that assertion because subsection D is permissive. Specifically, MCR 2.003(D) states that "[i]f it appears that there may be grounds for disqualification, the judge *may* ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification." [Emphasis added.]

But at other times, these four justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883, 889 (2003), then-Chief Justice Corrigan and Justices Taylor, Young, and Markman denied a motion for reconsideration of the Court's order denying the motion for disqualification and did not refer the motion to the State Court Administrator for the motion to be assigned to another judge for review de novo, as would be proper under MCR 2.003(C) (3).

and creates no recourse for parties who are concerned about a justice's impartiality.[3] Further, an IOP can be amended without notice to the public and without public comment.

- A majority of the justices could adopt a proposal, either one of the three published today or some other proposal that was not published for comment, as a Michigan Court Rule. Hopefully, such a rule would contain clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.

Rules governing the participation or disqualification of justices are best promulgated formally, after public notice and comment, in the form of an amended or new Michigan Court Rule that provides written enforceable rights and duties.

Alternatives A and B are offered as new court rules. Alternative C is offered as an amendment to the current court rule, MCR 2.003. Amending the existing court rule that governs the disqualification of all Michigan judges is clearer and simpler than enacting a new court rule that would apply only to Michigan Supreme Court justices.

2) Should the list of grounds for disqualification be exclusive or non-exclusive?

The current court rule, MCR 2.003, provides that the grounds for disqualification listed in the rule are not exclusive. MCR 2.003 states that a judge is disqualified when he cannot impartially hear a case, "including but not limited to" instances covered by the specific grounds listed.

Alternative C, like the current court rule, MCR 2.003, makes the list of grounds for disqualification *non-exclusive*, stating that "[d]isqualification of a judge is warranted for reasons that include, but are not limited to, the following . . . ."

But, by contrast, both alternatives A and B restrict the possible grounds for disqualification of justices to those on the *exclusive* list in the proposed rule. Alternative A not only provides an exclusive list of grounds for disqualification, but also specifies that "[u]nless one of the conditions specified below is met, it is the duty of a justice to serve in every case and a justice is not mandatorily required to withdraw from serving on a case."

The list of grounds for disqualification of a justice should be *non-exclusive*. An exclusive list precludes a motion for disqualification when there is a valid reason to disqualify a justice that is not included on the list of grounds. Any situation not on the list of grounds, no matter how egregious it might be, would not require the disqualification of a justice.

3) Should there be a rule that a justice is disqualified when he cannot impartially decide a case?

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[3] See Supreme Court internal operating procedures at <http://courts.michigan.gov/supremecourt/> (accessed on May 5, 2006), which provides in a disclaimer that the IOPs are unenforceable.

The current court rule, MCR 2.003(B), provides that a judge is "disqualified when the judge cannot impartially hear a case . . . ."

Alternative A entirely omits this important language, thus narrowing the grounds for disqualification.

Alternative B and alternative C improve on the current language in MCR 2.003 by stating that disqualification of a judge, including a justice, is warranted whenever the judge's "impartiality might objectively and reasonably be questioned." This language is taken from the federal rules, and has been interpreted as meaning whether "an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc v McMillen*, 764 F2d 458, 460 (CA 7, 1985).

Fair, clear, and impartial disqualification rules are necessary to preserve the integrity of the judicial system. Preserving the integrity of the judicial system requires the Michigan Supreme Court and all judges to recognize that it is not just actual bias or prejudice that erodes public confidence. The appearance of bias or prejudice can be just as damaging. Thus, the language in alternatives B and C, that a judge should be disqualified whenever it <u>appears</u> that he cannot impartially hear a case, is an improvement over the current provision in MCR 2.003(B) that a judge is disqualified whenever he cannot impartially hear a case.

4) Does the proposed rule require or permit a justice to explain his decision whether or not to recuse himself, and does it require or permit other justices to dissent?

Article 6, § 6 of the 1963 Michigan Constitution states that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . . " As I have previously stated, this provision applies to every decision of the Supreme Court, including a decision regarding a justice's participation or non-participation in a case.[4]

In obedience to Const 1963, art 6, § 6, alternative C requires that a justice's decision and reasons to deny a motion for his disqualification be in writing. Further, when the full Court reviews a justice's decision to deny a motion for disqualification, in obedience to art 6, § 6, alternative C requires the Court to include the reasons for its grant or denial of the motion for disqualification.

By contrast, alternatives A and B do not require a written explanation of a justice's decision to deny a motion for his disqualification. Additionally, alternative B *forbids* statements by any justice when the full Court reviews a justice's decision to deny a motion for his disqualification. Forbidding the publication of reasons for a decision of the Court or a dissent to that decision clearly violates art 6, § 6.[5]

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[4] *Gilbert v DaimlerChrysler Corp*, 469 Mich 883, 883 n 2 (2003).

[5] The full text of Const 1963, art 6, § 6 reads:

While not providing reasons for decisions to participate or not participate in a case may be consistent with the "unwritten traditions" of this Court, it is a traditional practice that does not conform with the requirements of Const 1963, art 6, § 6 and that does not adequately serve the Court or the public.

5) Should bias and prejudice against an attorney in a proceeding be a ground for disqualification?

Alternatives A and B omit a provision found in both the current version of MCR 2.003 and alternative C that disqualification is warranted if the judge is biased or prejudiced for or against an *attorney* in the proceeding. Under alternative A, disqualification of a justice is required or warranted only if the justice "is actually biased against or for a *party* in the proceeding." Under alternative B, disqualification is warranted only if the justice "is actually biased or prejudiced against or for a *party* in the proceeding."

Bias and prejudice against an attorney in a proceeding is potentially just as serious as bias and prejudice against a party in a proceeding. This critical omission from alternatives A and B seems designed to forestall motions for disqualification from attorneys such as Geoffrey Fieger, who has filed motions for disqualification against various justices, including me, alleging that the justice cannot impartially hear the case because of bias and prejudice against attorney Fieger.[6]

6) Should there be opportunity for review of a justice's decision not to recuse himself?

Under MCR 2.003(C)(3), the party moving for a judge's disqualification can ask for review of that judge's decision to deny the motion. In a court having two or more judges, MCR 2.003(C)(3)(a) provides for review de novo by the chief judge of the court. In a single-judge court, or when the challenged judge is the chief judge, MCR 2.003(C)(3)(b) provides for review de novo by another judge assigned by the State Court Administrator.

Alternative C amends MCR 2.003(C)(3) to provide that the entire Supreme Court may review a justice's decision to deny a motion for his disqualification.

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

[6] See, e.g., *Graves v Warner Bros*, 469 Mich 853 (2003), *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003), *Harter v Grand Aerie Fraternal Order of Eagles,* 693 NW2d 381 (2005), *McDowell v Detroit,* 474 Mich 999 (2006), *Stamplis v St John Health Sys*, 474 Mich 1017 (2006), *Heikkila v North Star Trucking, Inc,* 474 Mich 1080 (2006), and *Lewis v St John Hosp,* 474 Mich 1089 (2006).

Alternative B allows for limited review of a justice's decision by the Chief Justice, or by the entire Court if the challenged justice is the Chief Justice. However, as noted above, alternative B prohibits any statement or dissent in connection with the Court's decision to affirm or reverse a justice's decision to deny the motion for his disqualification. This prohibition violates Const 1963, art 6, § 6, which requires that all decisions of the Supreme Court, and all dissents by a justice, shall be in writing and shall include the reasons for the decision or the dissent.

Alternative A does not provide for any review of a justice's decision not to recuse himself. Failing to provide for any review is wrong. It is a most basic truth that the person who may be the least capable of recognizing a justice's actual bias and prejudice, or appearance of bias and prejudice, is the justice himself.

7) Is there a "duty to sit" applicable to Michigan Supreme Court justices?

[On the rare occasion, which to my knowledge has only occurred once in the history of Michigan, that there is an issue before the Court that affects all state judges' abilities to be impartial, then the Justices of the Michigan Supreme Court have a duty to participate pursuant to the common-law rule of necessity doctrine. Specifically, the one case in which this occurred was in 2008, *Citizens Protecting Michigan's Constitution v Secretary of State & Reform Michigan Government Now!(RMGN)*, 482 Mich 960 (2008), in which there was a challenge to a proposed constitutional amendment that would have reduced the salary of every judicial officer in the state, thereby affecting all Michigan judges' abilities to be impartial about the amendment. This necessity doctrine is different from the federal "duty to sit" espoused by Justices Corrigan, Young, and Markman and former Justice Taylor.]

Alternative A asserts that a justice has a duty to "serve in every case" unless one of the exclusive grounds for disqualification enumerated in alternative A exists. Neither the Michigan Constitution nor the Michigan Court Rules support alternative A's "duty to sit" premise.

Alternative A's "duty to sit" rationale was first publicly articulated in Chief Justice Taylor and Justice Markman's written explanation, concurred in by Justices Corrigan and Young, of their decision to participate in *Adair v Michigan,* 474 Mich 1027, 1040-1041 (2006). In my *Adair* statement, I explained that there is no justification to impose the federal "duty to sit" doctrine on Michigan Supreme Court justices.[7]

Justice Corrigan has a lengthy statement attempting to refute an alleged "scheme to install temporary justices." But there is no such scheme. None of the proposals submitted for public comment provides for the replacement of a justice who recuses himself or is disqualified from a case. Therefore, it is irrelevant and unnecessary to discuss the issue here beyond noting that the "duty to sit" premise of alternative A is incorrect. For those interested, I have responded to Justice Corrigan's concurrence in section III of this statement.

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[7] *Adair, supra* at 1044-1045.

8) Should a justice be allowed to raise the issue of another justice's disqualification without filing a motion or an affidavit?

Alternative B is unique in stating that any justice may raise the issue of a fellow justice's disqualification.[8] Such a rule would polarize the Court by allowing philosophically or politically motivated attacks on justices. Such a rule is also inappropriate because a challenging justice would not be a party to the proceedings before the Court.

The current court rule, MCR 2.003, requires that any party to a case wishing to raise a judge's disqualification must do so by motion[9] and that an affidavit must accompany the motion.[10] But under alternative B, a justice, who is not a party to the case, would be allowed to raise the issue without filing a motion. Neither the parties nor the public would know that one justice had raised the issue of another justice's disqualification in a case. Further, the challenging justice is not required by alternative B to file an affidavit supporting the motion, since subsection C(2) of alternative B only requires that an affidavit be filed with a motion for disqualification, and in alternative B no motion is required for one justice to challenge another justice's participation.

Thus, under alternative B, a justice could secretly raise the issue of a fellow justice's disqualification with no notice to the parties, no motion filed in the record, and no affidavit filed.

9) Should a party or an attorney be precluded from bringing a motion for disqualification based on statements by a justice when those statements are made during an election campaign?

There is currently no reference to or special protection for campaign speech in the current court rule, MCR 2.003, nor is any such special protection proposed in alternatives A or C.

However, alternative B excludes "campaign speech" from consideration in assessing a justice's impartiality. Alternative B states that "campaign speech protected by *Republican Party of Minnesota v White*, 536 US 765 (2002), [shall not] be a proper basis for the disqualification of a Justice."

Judicial candidates enjoy the right to free speech, and a judicial candidate has the right to state his views on a subject. Nevertheless, the Due Process Clause also requires that litigants have access to an unbiased and impartial decision maker.[11] Highly political and polarizing

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[8] There is no need for such a provision. When a justice has doubts about the propriety of a fellow justice participating in a particular case, guidance is found in the Code of Judicial Conduct. Canon 3(B)(3) suggests that a justice can "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."

[9] MCR 2.003(A).

[10] MCR 2.003(C)(2).

[11] *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

campaign speech by a judicial candidate or the candidate's campaign committees may raise legitimate questions regarding a justice's ability to impartially decide a case.

This language in Alternative B appears to be aimed at precluding the sorts of motions for disqualification that Chief Justice Taylor and Justices Corrigan, Young, and Markman have faced in response to campaign speech by themselves or their campaign committees:

● In a speech at the GOP State Convention on August 26, 2000, Justice Young said that "Geoffrey Fieger, and his trial lawyer cohorts hate this court. There's honor in that." This statement was one of the grounds listed in the motion for disqualification filed against Justice Young by the plaintiff's attorney, Geoffrey Fieger, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883 (2003).

● A campaign ad paid for by "Robert Young for Justice," "Stephen Markman for Justice," and "Clifford Taylor for Justice" included the language "No wonder Geoffrey Fieger, Jesse Jackson and the trial lawyers support Robinson, Fitzgerald and Thomas" (who ran against Chief Justice Taylor and Justices Young and Markman in the 2000 Supreme Court election). This statement was one of the grounds listed in the motion for disqualification filed against Chief Justice Taylor and Justices Young and Markman by the plaintiff's attorney, Geoffrey Fieger, in *Gilbert.*

● During his 2000 campaign, it was reported that Chief Justice Taylor made statements at a fundraiser about the cases that Mr. Fieger had pending in the appellate courts: "Geoffrey Fieger apparently has $90 million of lawsuit awards pending in the state Court of Appeals." *Justice Visits County,* The Sunday Independent, September 3, 2000, p 3. This statement was one of the grounds listed in the motion for disqualification filed against Chief Justice Taylor by the plaintiff's attorney, Geoffrey Fieger, in *Gilbert.*

● On February 20, 2006, the Committee to Re-elect Justice Maura Corrigan sent out a fundraising letter from former Governor John Engler stating that "[w]e cannot lower our guard should the Fiegers of the trial bar raise and spend large amounts of money in hopes of altering the election by an 11th hour sneak attack." This statement was one of the grounds listed in the motion for disqualification filed against Justice Corrigan by the respondent, Geoffrey Fieger, in *Grievance Administrator v Fieger,* 475 Mich 1211 (2006).

10) Should disqualification based on a spouse's or relative's participation in a case be limited to cases in which the spouse or relative is the lawyer "of record"?

Alternative B lowers the standard regarding motions for disqualification of a justice due to possible familial[12] bias or influence. MCR 2.003 requires that a judge be disqualified whenever a familial member is acting as a lawyer in a case. Alternative B provides that disqualification of a justice is required when the familial member is acting as a lawyer "of record" in the proceeding.

This proposed change from MCR 2.003(B)(6) appears to be in response to the motion filed in *Adair* asking for the disqualification of Chief Justice Taylor and Justice Markman. Chief Justice Taylor's wife and Justice Markman's wife are lawyers employed by the state Attorney General's office. Sharing a household and sharing income with a spouse who was given an at-will job by a public official whose office regularly appears before the Court formed the basis for the motion for disqualification filed against Chief Justice Taylor and Justice Markman in *Adair*. The proposed new rule would preclude challenges such as the one made in *Adair* unless a justice's spouse is the "lawyer of record" in the case.

11) Should the time limit for filing a motion for disqualification be shortened to within 14 days of the time that the grounds for disqualification *should have been* discovered?

Alternatives B and C add a new constraint to the time within which a motion for disqualification must be filed. Alternatives B and C provide that such motions must be filed within 14 days after the moving party "should have discovered" the ground for disqualification. The existing court rule, MCR 2.003(C)(1), does not impose this heightened time constraint.

[12] Bias or influence would be "familial" if it involves the justice's "spouse, or a person within the third degree of relationship to either [the justice or the spouse], or the spouse of such a person . . . ." MCR 2.003(B)(6).

II. Comparison Chart

For ease of comparison, below is a chart showing these essential questions raised by alternatives A, B, and C and the existing court rule, MCR 2.003.

	PROPOSED RULE A	PROPOSED RULE B	PROPOSED RULE C	MCR 2.003
1) What form does the proposed rule take?	New court rule	New court rule	Amendment to MCR 2.003	---
2) Is the list of grounds for disqualification exclusive or non-exclusive?	Exclusive	Exclusive	Non-exclusive	Non-exclusive
3) Is there a rule that a justice is disqualified when he cannot impartially decide a case?	No	Yes	Yes	Yes
4) Are reasons for a justice's decision whether or not to recuse himself required or permitted?	Not required	Not permitted	Required	Not required
5) Is bias or prejudice against an attorney in a proceeding grounds for disqualification?	No	No	Yes	Yes
6) Is there opportunity for review of a justice's decision not to recuse himself?	No	Yes	Yes	Yes
7) Is there a "duty to sit" imposed on justices?	Yes	No	No	No
8) Can a justice raise the issue of disqualification of another justice without filing a motion or an affidavit?	No	Yes	No	No
9) Can a motion for disqualification be based on campaign speech?	Yes	No	Yes	Yes
10) Are the grounds for disqualification when the justice is related to a lawyer in a case limited to when the relative is the lawyer "of record"?	No	Yes	No	No
11) Is the time for filing a motion shortened to 14 days after the grounds *should have been* discovered?	No	Yes	Yes	No

III. Response to Justice Corrigan's Statement

Justice Corrigan asserts that "unlike judges who serve on other courts in this state, Justices of this Court cannot be replaced by another judge." And alternative A asserts that a justice has a duty to "serve in every case . . . ."

But neither the Michigan Constitution nor the Michigan Court Rules support this "duty to sit" theory. As I have previously explained, there is no justification to impose the federal "duty to sit" doctrine on Michigan Supreme Court justices. *Adair, supra* at 1044-1045. [On the rare occasion, which to my knowledge has only occurred once in the history of Michigan, that there is an issue before the Court which affects all state judges' abilities to be impartial, then the Justices of the Michigan Supreme Court have a duty to participate pursuant to the common-law rule of necessity doctrine. Specifically, the one case in which this occurred was in 2008, *Citizens Protecting Michigan's Constitution v Secretary of State & Reform Michigan Government Now!(RMGN)*, 482 Mich 960 (2008), in which there was a challenge to a proposed constitutional amendment that would have reduced the salary of every judicial officer in the state, thereby affecting all Michigan judges' abilities to be impartial about the amendment. This necessity doctrine is different from the federal "duty to sit" espoused by Justices, Corrigan, Young, and Markman and former Justice Taylor.] A federal statute prohibits the temporary replacement of a United States Supreme Court justice by a retired federal judge. 28 USC 294(d). However, when a Michigan Supreme Court justice does not participate in a case for any reason, the Michigan Constitution permits that justice to be replaced by an active or retired judge.

Article 6, § 23, as amended in 1968, granted the Supreme Court a new and discretionary power to "authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments."[13] This provision does not distinguish among, but rather addresses all "judicial duties" performed by judges and justices in Michigan. The text of art 6, § 23 expressly limits whom this Court may authorize to perform judicial duties to "persons who have been elected and served as judges . . . ." It also provides that such authorizations must be for "limited periods or specific assignments." Thus, the 1968 amendment of art 6, § 23 allows this Court to ensure that judicial duties do not go unperformed.

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[13] Const 1963, art 6, § 23 provides:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

Persons who have been "elected and served as judges" have already taken an oath of judicial office.[14] Thus, the grant of discretionary authority in art 6, § 23 to the Supreme Court to

[14] Justice Corrigan asserts that judges, who have taken an oath of judicial office, and who could potentially perform judicial duties of a justice absent from this Court, "are not permitted to serve *as justices of this Court* unless they have been *elected to that position,"* Const 1963, art 6, § 2, or appointed by the Governor, Const 1963, art 6, § 23. Yet nothing in our state constitution specifically prohibits a judge from serving as a justice; thus her argument is unsupported. Had there been such an express provision, this question would not be before this Court.

Further, Justice Corrigan's application of art 6, § 2 to the last sentence of art 6, § 23 is in direct conflict with the first sentence of art 6, § 23, which she concedes allows the Governor to appoint a person as a justice who has not been "elected" to serve as a justice of the Supreme Court. Justice Corrigan fails to recognize that the more specific provisions of the first and last sentences of art 6, § 23 prevail as exceptions to the general statement of art 6, § 2. Art 6, § 2 establishes that the Supreme Court "shall consist of seven justices elected at non-partisan elections as provided by law." This language establishes the general rule that the Supreme Court has seven justices who have been elected. Judges in all courts of this state are elected. See Const 1963, art 6, § 8 (pertaining to judges elected to the Court of Appeals), § 12 (pertaining to judges elected to circuit courts), and § 16 (pertaining to judges elected to probate courts). Art 6, § 23 then lists two exceptions to the general rules contained in art 6, §§ 2, 8, 12, and 16.

First, art 6, § 23 provides that when there is a vacancy "in the office of judge of any court of record," before that judge's term is over, that vacancy "shall be filled by appointment by the governor." Thus, art 6, § 23 contemplates that if a vacancy occurs before the completion of an elected judge's term of office, the Governor shall appoint a replacement judge. This gubernatorial appointment power applies to judges in "any court of record," which necessarily includes justices of the Supreme Court. Further, it operates as an exception to the general rules of elected judges, including justices, as set forth in art 6, §§ 2, 8, 12, and 16. While the first sentence of art 6, § 23 specifically authorizes the Governor to appoint a replacement judge for judicial "vacancies," the last sentence of § 23 grants the Supreme Court the power to authorize persons who have been elected and have served as judges to temporarily perform judicial duties in instances *other than judicial vacancies*.

Second, in those instances not involving a judicial vacancy, the Supreme Court, as opposed to the Governor, "may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." Thus, this last sentence of art 6, § 23 covers those instances when a need short of a judicial vacancy has arisen, for example, when a judge, including a justice, is ill, is on vacation, or is suspended, or when a judge, including a justice, decides to recuse himself. Justice Corrigan insists that this second exception, for something less than a judicial vacancy, only applies to judges and not to justices of the Supreme Court. Yet, there is no limiting language anywhere in the Michigan Constitution to that effect and art 6, § 23 addresses those two primary instances when there is the need for judicial duties to be performed: in the first instance, because of the existence of a judicial "vacancy," and, in the second instance, because of the need to perform judicial duties for "limited periods or specific assignments."

"authorize persons" who have been elected and have served as judges to perform "judicial duties" is not a grant of an appointment power.[15] Rather, it is a power to authorize persons who have been elected and have served as judges to perform judicial duties for a limited period or specific assignment in circumstances in which a judicial duty would otherwise go unfulfilled, such as because of illness, disqualification, suspension, vacation, etc.

Article 6, § 23 does not distinguish or exclude from its scope the "judicial duties" performed by Supreme Court justices. The ratifiers of this constitutional language would have understood Supreme Court justices to both have and perform "judicial duties," and the term "judicial duties" would have been commonly understood to include the "judicial duties" of Supreme Court justices for a limited period or specific assignment. Article 6, § 23 thus allows this Court to assign persons "who have been elected and served as judges" to perform "judicial duties," including the "judicial duties" of Supreme Court justices.[16]

This interpretation of art 6, § 23 is supported by contrasting the language of the provision before the 1968 amendment with the language originally adopted in 1963. Before the 1968 amendment, there was no provision in art 6, § 23 for this Court to authorize a person who had been elected and had served as a judge to perform judicial duties unless a permanent vacancy occurred on a court. The Supreme Court was permitted to fill permanent vacancies in judicial offices "from the occurrence of the vacancy until the successor is elected and qualified."[17]

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[15] Thus, Justice Corrigan's concern that my interpretation of art 6, § 23 violates Const 1963, art 6, § 27 is mistaken. Moreover, even if the power to authorize a person who has been elected and has served as a judge to perform judicial duties is equated to a power of appointment referred to in art 6, § 27, there is no conflict because art 6, § 27 expressly permits this Court to make appointments "as provided in this constitution." As long as this Court exercises its power to authorize persons to perform judicial duties in conformance with the limitations of art 6, § 23, it acts within its constitutional authority.

[16] Similarly, in *Giannotta v Governor,* 71 Mich App 15 (1976), a Court of Appeals panel held that the ratifiers of the 1968 amendments of art 6, § 23 would commonly have understood that the amendment permitted the Governor to fill vacancies on the Supreme Court, as well as vacancies in other judicial offices. The panel rejected the notion that the ratifiers of the 1968 amendment would have understood the provision to exclude "'justices' when using the term 'judge'." *Giannotta, supra* at 20. If this were not true, the Governor would have no power to make appointments to fill vacancies on the Michigan Supreme Court caused by death, resignation, or removal of a justice.

[17] Const 1963, art 6, § 23 formerly read:

> A vacancy in the elective office of a judge of any court of record shall be filled at a general or special election as provided by law. <u>The supreme court may authorize persons who have served as judges and who have retired, to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor is elected and qualified</u>. Such persons shall be ineligible for election to fill the vacancy. [Emphasis added.]

Justice Corrigan's separate statement reveals her confusion regarding the full scope of the 1968 amendment as it pertains to the authority of this Court. She focuses exclusively on the fact that the amendment restored the Governor's authority to fill vacancies on the courts by appointment.[18] Justice Corrigan fails to understand that the 1968 amendment created a new discretionary power in the Supreme Court to authorize persons who have been elected and have served as judges to perform judicial duties for limited periods or specific assignments. This new discretionary power added to art 6, § 23 by the 1968 amendment ensures that judicial duties critical to the proper and efficient functioning of the judiciary will not go unperformed because of circumstances such as illness, disqualification, suspension, vacation, etc.

I do not suggest that art 6, § 23 *requires* this Court to authorize a person who has been elected and has served as a judge to perform judicial duties every time an illness, disqualification, or other occurrence prevents judicial duties from being performed. And none of the three proposals submitted for public comment provides for the temporary replacement of a justice who recuses himself or is disqualified from a case.

But art 6, § 23 as amended in 1968 permits this Court to authorize a person who has been elected and has served as a judge to perform judicial duties when, in the exercise of its sound discretion, doing so is necessary.[19] The existence of this constitutional authority undermines the "duty to sit" theory in alternative A.

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[18] Justice Corrigan suggests that Const 1963, art 6, § 2 prohibits the appointment of a judge to fill a temporary vacancy on the Supreme Court. Art 6, § 2 provides:

> The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. The term of office shall be eight years and not more than two terms of office shall expire at the same time. Nominations for justices of the supreme court shall be in the manner prescribed by law. Any incumbent justice whose term is to expire may become a candidate for re-election by filing an affidavit of candidacy, in the form and manner prescribed by law, not less than 180 days prior to the expiration of his term.

It is clear that art 6, § 2 does not address vacancies at all, either temporary or permanent. Her reading of the provision fails to account for the fact that when the Governor appoints a person to fill a permanent vacancy on the Supreme Court, as provided by art 6, § 23, that person has not yet been elected at a nonpartisan election.

[19] In *Adair,* I offered comparisons to other states to demonstrate that there is nothing inherently wrong or unusual about a retired supreme court justice, lower appellate court judge, or trial court judge being authorized to sit for a non-participating state supreme court justice. The fact, as Justice Corrigan points out in her separate statement, that many states have constitutional provisions allowing a judge to sit for a justice only proves my point. Justice Corrigan further argues that because some of the states I cited in *Adair* had express constitutional provisions authorizing judges to sit for non-participating supreme court justices, my argument was undermined. I note, however, that not every state has express provisions. I further note that my

Further, nothing in the Michigan Constitution entitles litigants to seven participating justices. Nor is the "duty to sit" theory supported by the Michigan Court Rules. The people of Michigan are justified in the expectation that a justice will participate in every case unless there is a valid, publicly known reason why the justice should not participate. However, our court rules anticipate that not every justice will participate in every case. MCR 7.316(C) permits just two justices to render a decision of the Court, providing simply that "a decision of the Supreme Court must be made by concurrence of a majority of the justices voting." MCR 7.316(C) also plainly permits "affirmance of action by a lower court or tribunal by even division of the justices . . . ." While it is certainly preferable to avoid *needless* disqualifications that result in an even split, an even split is permitted by the court rules. And it cannot be disputed that the decision-making process of this Court is seriously distorted when a justice who is biased or prejudiced or who appears to be biased or prejudiced against a party or attorney participates in a case.

For these reasons, the "duty to sit" rule in alternative A is not required, and its rationale is not supported by the Michigan Constitution or the Michigan Court Rules.

IV. Conclusion

There should be clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. The rules should follow the mandates of the Michigan Constitution and should ensure that the standards governing the participation and disqualification of justices improve, not diminish, the public's trust and confidence in the Michigan Supreme Court and the entire judiciary.

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point in citing to those states was to make it clear that there is no inherent "duty to sit" requirement applicable to state supreme court justices. Other states, whether through express provisions or more comprehensive authorization, have acknowledged the need for occasional replacement of state supreme court justices and have rejected the federal "duty to sit" doctrine in the face of that need. Obviously, however, the Michigan Constitution controls our practice, and art 6, § 23 allows this Court "to authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." It does not exclude from the judicial duties mentioned those that are borne by Michigan Supreme Court justices.

CORRIGAN, J. (*concurring*). I concur in the publication for comment of three alternative proposals regarding the disqualification of Supreme Court justices. I write separately to urge members of the bench and bar to carefully consider the proposals in light of the following observations.

I. The decision whether to recuse is for the individual justice

Initially, I note that this Court's 172-year tradition is that motions for recusal are decided by each justice without review by the other members of this Court, subject to appeal in the United States Supreme Court. This longstanding recusal procedure is consistent with the United States Supreme Court's policy for deciding recusal motions. Individual justices, rather than the full Supreme Court, decide whether recusal is warranted. *Cheney v United States Dist Court for the Dist of Columbia*, 541 US 913 (2004). Indeed, Justice Ginsburg explained the Court's recusal policy in a discussion transcribed in a law review article. See *The Day, Berry & Howard visiting scholar: An open discussion with Justice Ruth Bader Ginsburg*, 36 Conn L Rev 1033, 1039 (2004):

Paul Berman:

> And would the recusal decision solely be an individual decision by the Justice or is there ever any conversation among the Justices about recusal issues?

Justice Ginsburg:

> *In the end it is a decision the individual Justice makes*, but always with consultation among the rest of us. . . . [Emphasis added.]

Justice Ginsburg also stated that "[b]ecause there's no substitute for a Supreme Court Justice, it is important that we not lightly recuse ourselves." *Id*. She explained that "on the Supreme Court, if one of us is out, that leaves eight, and the attendant risk that we will be unable to decide the case, that it will divide evenly. Some think that a recusal in the Supreme Court is equivalent to a vote against the petitioner." *Id*. Therefore, it is beyond dispute that this Court's traditional recusal practice is consistent with the United States Supreme Court's own practice regarding recusal motions.

II. We should await the decision in Caperton v Massey

Before we adopt any of the published proposals, we should await the decision in a case currently pending in the United States Supreme Court, *Caperton v Massey,* Docket No. 08-22. At issue in *Caperton* is whether recusal is constitutionally required where a state supreme court justice allegedly owed a debt of gratitude to a contributor to an independent committee over which the justice had no authority. The contributor's

corporation was a party in a case before the court. The ultimate decision in *Caperton* may determine the proper content and scope of any recusal rule that we adopt, given that we will be required to comply with any constitutional standards announced in *Caperton*.

In reviewing the oral argument transcript in *Caperton*, I note that many of the justices' questions expressed concerns regarding the potentially unlimited reach of a rule mandating recusal for a mere probability or appearance of bias, as opposed to actual bias. For example, Chief Justice Roberts asked:

> What about the United Mine Workers. If they give a contribution to somebody's campaign, is that judge then recused in every labor case? Or I don't know if they give contributions or not, but a group like Mothers Against Drunk Driving, because they think the judge is too lenient in DWI [driving while impaired] cases, so they give contributions. Is their preferred judge recused in every DWI case? [*Caperton* oral argument, p 13.]

Chief Justice Roberts further noted that a broad recusal requirement could lead to such abuses as making campaign contributions solely to disqualify a particular justice:

> What about protective donations? You actually give, not three million, but a couple hundred thousand to somebody you don't want deciding your case. And it comes up, and you say, you have to recuse yourself because . . . . [*Caperton* oral argument, p 55.]

Also, Justices Scalia and Kennedy each noted the difficulty of administering a system that would require recusal on the basis of a vague standard such as the mere perception or probability of bias. See *Caperton* oral argument, pp 15-16, 18.

Similar concerns could be raised regarding this Court's proposals B and C, both of which would require recusal when "[t]he judge's impartiality might objectively and reasonably be questioned." It is not clear how those proposed rules would be administered in Michigan, where anonymous donors may legally finance judicial campaign advertisements.

Consider, for example, our most recent election in 2008: the nonpartisan Michigan Campaign Finance Network (MCFN) found that anonymous donors dominated the campaign for the seat now held by Justice HATHAWAY. The MCFN indicated that more than 60 percent of the $6 million in spending will not be disclosed in any campaign

finance report because Michigan law does not require disclosure of financing for advertisements that do not expressly advocate voting for or against a candidate.[20]

Quite understandably, then, Justice HATHAWAY may not even be aware of the identities of individuals or organizations that funded these advertisements. Yet if proposal B or C is adopted, a party may seek her recusal because the other party had funded an advertisement essentially supporting her candidacy by attacking her opponent. Or what if the party seeking recusal had itself funded an advertisement that sought to define Justice HATHAWAY's character, qualifications, or record? Even though she does not know the donors and is not actually biased, could Justice HATHAWAY's impartiality "objectively and reasonably" be questioned under proposals B or C? How could she even comply with this mandatory recusal rule if she does not know the identities of the donors?

Indeed, these problems will not be limited to cases in which a campaign contributor is an actual party. As Chief Justice Roberts asked, what about campaign contributors that have publicly expressed views regarding a legal issue before the Court? Suppose that the Chamber of Commerce prefers a given interpretation of a tort reform law at issue in a case pending in our Court. If, as the MCFN found, the Chamber of Commerce funded advertisements that sought to define Justice HATHAWAY's record, could her impartiality "objectively and reasonably" be questioned whenever the chamber files an amicus brief? What if the chamber decides as a matter of strategy to file an amicus brief merely to obtain Justice HATHAWAY's recusal? And in future campaigns, might not the chamber, or any other organization interested in legal issues before this Court, fund advertisements that address an incumbent justice's record or character if it wishes to disqualify that justice in upcoming cases?

Given that proposals B and C would remove the recusal decision from the individual justice for the first time in our 172-year history, troubling questions arise regarding the procedure for the recusal decision. If the challenged justice's knowledge of the identities of anonymous donors is relevant to whether her impartiality could "reasonably and objectively" be questioned, and the justice herself is not entrusted to make this determination, what happens next? Would this Court appoint a master to make findings of fact? Would the master simply take the word of the challenged justice regarding her knowledge, or would the master call witnesses to ascertain what the justice knew and when she knew it? Would such wide-ranging investigations promote the collegiality necessary to the healthy functioning of a multi-member appellate court?

In short, the anonymity of donors under Michigan law only compounds the difficulty in complying with the open-ended recusal rule in proposals B and C. These

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[20] See the MCFN's November 19, 2008, press release at <http://www.mcfn.org/press.php?prId=77> (accessed March 12, 2009).

questions warrant scrutiny before adopting a rule broader than that which this Court has required in its 172-year history.

III. Justices of this Court cannot be replaced

Another significant concern with the adoption of the broader recusal rule in proposals B and C is that, unlike judges who serve on other courts in this state, justices of this Court cannot be replaced by another judge. In her statement in *Adair v Michigan*, 474 Mich 1027 (2006), Justice WEAVER opined that a justice may be replaced by an active or retired judge.[21] She asserted in *Adair* that "[n]umerous other state supreme courts appoint a trial judge or court of appeals judge to sit on the supreme Court" when a justice is not participating or in other situations. *Id*. at 1045 n 4. Justice WEAVER then listed several states, but cited no authority for her claim.

My research indicates that, in most of the states Justice WEAVER listed, *the state constitution itself* provides for the temporary appointment of active or retired judges or retired justices to the state supreme court, or to "any court" in the state. Our constitution, by contrast, contains no analogous provision for the appointment of temporary justices.

Specifically, in the following states listed by Justice WEAVER, express constitutional provisions exist on this matter:

- *Arizona*: "Any retired justice or judge of any court of record who is drawing retirement pay may serve as a justice or judge of any court." Ariz Const, art 6, § 20.

- *Florida*: "When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices." Fla Const, art 5, § 3(a).

- *Georgia*: "If a Justice is disqualified in any case, a substitute judge may be designated by the remaining Justices to serve." Ga Const, art 6, § 6, ¶ I.

- *Hawaii*: "The chief justice may assign a judge or judges of the intermediate appellate court or a circuit court to serve temporarily on the supreme court . . . . As provided by law, at the request of the chief justice, retired justices of the supreme court may also serve temporarily on the supreme court . . . ." Hawaii Const, art 6, § 2.

[21] None of the proposed recusal rules provide for the appointment of temporary justices. On the contrary, proposals B and C expressly state that when a justice is disqualified, the case will be decided by the remaining justices. But I will nonetheless address this issue in light of Justice WEAVER's assertions in *Adair*.

- *Maryland*: "[T]he Chief Judge of the Court of Appeals may, in case of a vacancy, or of the illness, disqualification or other absence of a judge or for the purpose of relieving an accumulation of business in any court assign any judge except a judge of the Orphans' Court to sit temporarily in any court except an Orphans' Court." Md Const, art 4, § 18(b)(2).[22]

- *Minnesota*: "As provided by law judges of the court of appeals or of the district court may be assigned temporarily to act as judges of the supreme court upon its request . . . ." Minn Const, art 6, § 2.

- *Missouri*: "The supreme court may make temporary transfers of judicial personnel from one court or district to another as the administration of justice requires, and may establish rules with respect thereto. Any judge shall be eligible to sit temporarily on any court upon assignment by the supreme court or pursuant to supreme court rule." Mo Const, art 5, § 6. "Any retired judge, associate circuit judge or commissioner, with his consent, may be assigned by the supreme court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge he shall have the same powers as an active judge." Mo Const, art 5, § 26(3).

- *Nebraska*: "The Legislature may provide that any judge of the Supreme Court or judge of the appellate court . . . who has retired may be called upon for temporary duty by the Supreme Court. Whenever necessary for the prompt submission and determination of causes, the Supreme Court may appoint judges of the district court or the appellate court to act as associate judges of the Supreme Court, sufficient in number, with the judges of the Supreme Court, to constitute two divisions of the court of five judges in each division. . . . The judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute and all appeals involving capital cases and may review any decision rendered by a division of the court. In such cases, in the event of the disability or disqualification by interest or otherwise of any of the judges of the Supreme Court, the court may appoint judges of the district court or the appellate court to sit temporarily as judges of the Supreme Court, sufficient to constitute a full court of seven judges." Neb Const, art 5, § 2.

- *New Jersey*: "When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior in service, as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court." NJ Const, art 6, § 2, ¶ 1.

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[22] The Court of Appeals is the court of last resort in Maryland. Md Const, art 4, § 1.

- *New York*: "In case of the temporary absence or inability to act of any judge of the court of appeals, the court may designate any justice of the supreme court to serve as associate judge of the court during such absence or inability to act." NY Const, art 6, § 2(a).[23]

- *Ohio*: "If any member of the [supreme] court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge." Ohio Const, art 4, § 2(A).

- *South Carolina*: "The General Assembly shall specify the grounds for disqualification of Justices and judges to sit on certain cases. The General Assembly shall also provide for the temporary appointment of men learned in the law to sit as special Justices and judges when the necessity for such appointment shall arise." SC Const, art 5, § 19.

- *South Dakota*: "The chief justice shall have power to assign any circuit judge to sit on another circuit court, or on the Supreme Court in case of a vacancy or in place of a justice who is disqualified or unable to act." SD Const, art 5, § 11.

- *Texas*: "When the Supreme Court, the Court of Criminal Appeals, the Court of Appeals, or any member of any of those courts shall be . . . disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes." Tex Const, art 5, § 11.

- *Utah*: "If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause." Utah Const, art 8, § 2.

- *Vermont*: "The chief justice may appoint and assign a retired justice or judge with his or her consent or a superior judge or district judge to a special assignment on the supreme court." Vt Stat Ann, tit 4, § 22(a). "Special assignments may be made as a result of the disqualification, disability or death of a justice or judge, or

[23] The New York Court of Appeals is the court of last resort, and the appellate divisions of the supreme court constitute the intermediate appellate courts, in that state. NY Const, art 6, § 1(a).

because of the vacancy of a judicial office, or because the business of the court requires." Vt Stat Ann, tit 4, § 22(c).[24]

- *West Virginia*: "When any justice is temporarily disqualified or unable to serve, the chief justice may assign a judge of a circuit court or of an intermediate appellate court to serve from time to time in his stead." W Va Const, art 8, § 2.

- *Wyoming*: "If a justice of the supreme court for any reason shall not participate in hearing any matter, the chief justice may designate one of the district judges to act for such nonparticipating justice." Wy Const, art 5, § 4(a).

Unlike the constitutions in the states listed by Justice WEAVER, the Michigan Constitution does not authorize the appointment of temporary Justices. On the contrary, Const 1963, art 6, § 2 states, "The supreme court *shall* consist of seven justices *elected at non-partisan elections as provided by law*" (emphasis added). By using the mandatory term "shall," Const 1963, art 6, § 2 provides for a state supreme court that *must* be comprised of seven justices chosen *by the people themselves* rather than by the members of this Court. Therefore, any argument for installing temporary justices would subvert the electoral system mandated by our constitution because it would reconstitute temporarily the membership of this Court.

I also note that Const 1963, art 6, § 27 provides: "The supreme court, the court of appeals, the circuit court, or any justices or judges thereof, shall not exercise any power of appointment to public office except as provided in this constitution." Thus, this Court has no appointive powers in the absence of an express constitutional authorization.

Justice WEAVER further opined in *Adair* that Const 1963, art 6, § 23, authorizes this Court to appoint temporary justices. That provision, as amended in 1968, states:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

[24] The Vermont provisions are statutory rather than constitutional enactments.

The history of the enactment of § 23 offers some insight. Before the adoption of the 1963 constitution, the authority to fill judicial vacancies belonged to the Governor. Const 1850, art 6, § 14 provided: "When a vacancy occurs in the office of judge of the supreme, circuit or probate court, it shall be filled by appointment of the governor, which shall continue until a successor is elected and qualified." Similarly, Const 1908, art 7, § 20 stated: "When a vacancy occurs in the office of judge of any court of record, it shall be filled by appointment of the governor, and the person appointed shall hold the office until a successor is elected and qualified. When elected, such successor shall hold the office the residue of the unexpired term."

The 1963 constitution removed the Governor's power to fill judicial vacancies. Const 1963, art 6, § 23, prior to the 1968 amendment, provided:

> A vacancy in the elective office of a judge of any court of record shall be filled at a general or special election as provided by law. The supreme court may authorize persons who have served as judges and who have retired, to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor is elected and qualified. Such persons shall be ineligible for election to fill the vacancy.

The convention comment explained the reason for removing the Governor's historic authority to make vacancy appointments:

> The change is made in order to maintain consistency in the idea that this state should have an elected judiciary. The present system of appointment by the governor to fill vacancies, bestowing on the appointee the incumbency designation, has had an overwhelming tendency to insure the election of the appointee. This has created in effect an appointive judiciary. [2 Official Record, Constitutional Convention 1961, p 3388.]

But the elimination of the Governor's appointive authority in the 1963 constitution led to unintended consequences. "The unexpected occurred when, in practice, there were simply too few retired judicial officeholders to fill the vacancies which became available." *Giannotta v Governor*, 71 Mich App 15, 17 (1976).

Thus, the voters in 1968 approved an amendment of § 23 that restored the Governor's authority to fill vacancies. This amendment was ratified at a special election held on August 6, 1968. Although this amendment restored the Governor's appointive authority, it also included language in the last sentence allowing this Court to appoint judges "to perform judicial duties for limited periods or specific assignments."

In *Schwartz v Secretary of State*, 393 Mich 42, 47-48 (1974), this Court explained the purpose of the 1968 amendment:

> The language of the section makes two things abundantly clear. First, the people intended to rectify the mistake of the 1963 Constitution in its original form of having removed the historic constitutional authority of the Governor to appoint persons to fill judicial vacancies. This Court would blink the facts of life if it did not take judicial notice of the fact that this omission embarrassed the operation of government by leaving important judicial offices without their own regular incumbent for long periods of time. The first sentence of § 23, as amended, rectifies this error by restoring gubernatorial authority to appoint to fill judicial vacancies caused by the incumbent leaving office for one reason or another.
>
> Second, the people on the other hand intended to reserve to themselves the power to fill newly created judgeships by election "as provided by law." First, § 23, as amended, specifies such newly created judgeship "shall be filled by election." Second, examination of the language describing the type of vacancy to which the Governor may appoint makes it clear that newly created judgeships are precluded. Included are vacancies "by death, removal, resignation or vacating of the office." In other words there must have been a judge who, for one of the enumerated reasons, is no longer present. Again the reason for this can hardly escape judicial notice, namely the prevention of collusion between the Governor and the Legislature to create a new judgeship for a favored appointee.

See also *Attorney General v Riley*, 417 Mich 119, 132-134 (1983).

The 1968 amendment essentially recognized that the Governor has the authority to appoint judges to fill vacancies that arise from death, removal, resignation, or vacating of the office. The recusal of a justice does not create a vacancy because a recusal does not arise from death, removal, resignation, or vacating of the office. When a justice is disqualified in a case, the justice simply declines to participate, but his seat does not thereby become vacant. Plainly, the appointment provisions of art 6, § 23, do not authorize the appointment of a temporary justice to fill a seat that is not vacant.

Accordingly, after a review of the relevant authorities, I am unable to conclude that the installation of temporary justices to replace duly elected members of this Court has any basis in the history of this state or the traditions of this Court. The proponent of such a momentous and unprecedented change surely must bear the burden of presenting at least some evidence that a change is legally justified. Yet there is no indication that § 23 was ever understood to permit this Court to appoint temporary justices.

YOUNG, J. I write to urge members of the public and the bar to take a serious interest in the several proposals for a Supreme Court disqualification policy and to consider them in the historical context in which they are offered.

Having impartial jurists is one of the critical tenets of our judicial system. However, in a state such as Michigan, where the People have chosen to hold their judicial officers accountable to them in an elective system, the public is entitled to have their electoral choices be respected and not undermined by a disqualification process that incentivizes capricious or politicized removal of justices from participating in the cases before the Supreme Court.

For the entire existence of our Court, the justices of the Michigan Supreme Court have conscientiously striven to address questions of judicial disqualification—whether raised on motion by one of the parties or on the justice's own initiative. Members of this Court and our predecessors have done so under our unvaried practice that is codified in proposal A. In short, a justice confronted with a disqualification motion has typically consulted with members of the Court and made a determination whether participation in a particular matter was appropriate. Other than providing counsel, other members of the Court have not participated in the decision. This historic practice is very similar to the one followed by the United States Supreme Court. See Appendix A.

Until the last decade, no one has challenged, or apparently had reason to challenge, the Court's historical practice for addressing justice disqualification issues. However, with the judicial philosophical shift in the majority of this Court,[1] disqualification has taken on a new, more politicized, role.

This new tactical approach of altering the philosophical majority of this Court was explicitly raised in the March 2006 issue of the *Michigan Bar Journal*. In a letter to the

[1] It is no secret that the philosophical majority of this Court changed with the election of Justice Corrigan, my appointment and that of Justice Markman. The philosophical transformation of the Michigan Supreme Court, and the debate that has accompanied this transformation—a debate similar in some ways to that taking place within the federal judicial system—have resonated strongly in the electoral, political process that the Michigan Constitution has chosen as the method by which citizens of this State select their justices. Perhaps not surprisingly, those who have been most comfortable with the approach of the Michigan Supreme Court over the previous decades have been resistant to this transformation, and many have responded forcefully in political opposition. The 2000 Supreme Court election, in which three members of the Court's then philosophical majority stood for election, was one of the most bitterly contested in the state's history. Despite a well financed and organized opposition, all three incumbents were returned to office by Michigan voters. As noted below, the philosophical majority has again shifted with the election of Justice Hathaway last November.

editor, an attorney suggested that the judicial electoral process is an unsatisfactory solution for addressing what he believed to be this Court's then "unfavorable judicial philosophy" and decision-making. Therefore, he urged the use of motions to disqualify as a suitable *alternative* to elections to alter the philosophical balance of the Court. See March 2006 *Michigan Bar Journal* at 12. The last point is particularly relevant to the Michigan Supreme Court where justices cannot be replaced by another judicial officer and thus the improvident recusal of even one member may result in an evenly divided Court and the inability to render a binding decision.[2]

I believe that the evidence supports my contention that the current interest in disqualification is a manufactured crisis—and a political one at that. In 1999, when the judicial philosophy of the Court changed, disqualification motions became a tactic and were used in a politicized manner—as a means to seek to alter the decision-making and outcome of a particular case to better suit the preferences of the attorney. In fact, between January 1999 and December 2008, some 23,346 appeals were filed in this Court. During that period, only 17 disqualification motions were submitted. With the exception of one motion that initially included Justice Weaver, but later dropped her, all of the motions were lodged against one or more members of the former philosophical majority. Of those 17 motions, 71 percent were filed by a *single* law firm.

With the 2008 election, the philosophical majority of the Court has changed yet again. As a result of this change wrought by the citizens in the last election, it is highly unlikely that the political impetus for using disqualification motions for frank political reasons will be as strong as it was previously. Given that the so-called crisis regarding disqualification has been an event essentially limited to one law firm and the motivation for using disqualification as a weapon for removing justices to achieve a different philosophical balance has abated with the last election, I question why a wholesale change at this time is warranted. Moreover, the pendency of the case currently before the United States Supreme Court, *Caperton v Massey,* Docket No. 08-22, means that this Court and all others may have to adjust disqualification practices to accommodate any new constitutional principle that Court might create.

For these reasons, it is my hope that members of the bar and the public will give these disqualification proposals more than reflexive and cursory attention.

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[2] Here too, the public should be mindful that two of our colleagues have made the radical proposal that justices *can* be replaced by other judicial officers. See *Adair v Dep't of Ed*, 474 Mich 1027, 1045, 1051 (2006). The constitutionality of such a replacement proposition, as well as its impact on the stability of this Court, are topics that warrant thoughtful comment from members of the bar and the public at large.

Appendix A

APPENDIX

FOR IMMEDIATE RELEASE
November 1, 1993

Supreme Court of the United States
Washington, D. C. 20543

STATEMENT OF RECUSAL POLICY

We have spouses, children or other relatives within the degree of relationship covered by 28 U.S.C. §455 who are or may become practicing attorneys. In connection with a case four Terms ago, the Chief Justice announced his policy (with which we are all in accord) regarding recusal when a covered relative is "an associate in the law firm representing one of the parties before this Court" but has "not participated in the case before the Court or at previous stages of the litigation." See Letter to Joseph Spaniol, Clerk of the Court, from the Chief Justice (Feb. 20, 1990), pertaining to Brutsche v. Cleveland-Perdue, No. 89-1167, cert. denied, 111 S. Ct. 368 (1990). We think it desirable to set forth what our recusal policy will be in additional situations—specifically, when the covered lawyer has participated in the case at an earlier stage of the litigation, or when the covered lawyer is a partner in a firm appearing before us. Determining and announcing our policy in advance will make it evident that future decisions to recuse or not to recuse are unaffected by irrelevant circumstances of the particular case, and will provide needed guidance to our relatives and the firms to which they belong.

The provision of the recusal statute that deals specifically with a relative's involvement as a lawyer in the case requires recusal only when the covered relative "[i]s acting as a lawyer in the proceeding." §455(b)(5)(ii). It is well established that this provision requires personal participation in the representation, and not just membership in the representing firm, see, e.g., Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1113 (CA5), cert. denied, 449 U. S. 820 (1980). It is also apparent, from use of the present tense, that current participation as a lawyer, and not merely past involvement in earlier stages of the litigation, is required.

A relative's partnership status, or participation in earlier stages of the litigation, is relevant, therefore, only under one of two less specific provisions of §455, which require recusal when the judge knows that the relative has "an interest that could be substantially affected by the outcome of the proceeding," §455(b)(5)(iii), or when for any reason the judge's "impartiality might reasonably be questioned," §455(a). We think that a relative's partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not automatically trigger these provisions. If that were the intent of the law, the per se "lawyer-related recusal" requirement of §455(b)(5)(ii) would have expressed it. Per se recusal for a relative's membership in the partnership appearing here, or for a relative's work on the case below, would render the limitation of §455(b)(5)(ii) to personal work, and to present representation, meaningless.

We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court. Given the size and number of today's national

law firms, and the frequent appearance before us of many of them in a single case, recusal might become a common occurrence, and opportunities would be multiplied for "strategizing" recusals, that is, selecting law firms with an eye to producing the recusal of particular Justices. In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.

Absent some special factor, therefore, we will not recuse ourselves by reason of a relative's participation as a lawyer in earlier stages of the case. One such special factor, perhaps the most common, would be the relative's functioning as lead counsel below, so that the litigation is in effect "his" or "her" case and its outcome even at a later stage might reasonably be thought capable of substantially enhancing or damaging his or her professional reputation. We shall recuse ourselves whenever, to our knowledge, a relative has been lead counsel below.

Another special factor, of course, would be the fact that the amount of the relative's compensation could be substantially affected by the outcome here. That would require our recusal even if the relative had not worked on the case, but was merely a partner in the firm that shared the profits. It seems to us that in virtually every case before us with retained counsel there exists a genuine possibility that success or failure will affect the amount of the fee, and hence a genuine possibility that the outcome will have a substantial effect upon each partner's compensation. Since it is impractical to assure ourselves of the absence of such consequences in each individual case, we shall recuse ourselves from all cases in which appearances on behalf of parties are made by firms in which our relatives are partners, unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares.

William H. Rehnquist

John Paul Stevens

Sandra Day O'Connor

Antonin Scalia

Anthony M. Kennedy

Clarence Thomas

Ruth Bader Ginsburg

MARKMAN J. (*concurring*). In place of a judicial disqualification process that has existed since 1837 on this Court-- one that has been used by the United States Supreme Court, one that has been employed by most other state supreme courts, and one that has worked effectively over the decades to maintain a fair and impartial judicial system in Michigan-- the majority would apparently replace it with a process that will almost certainly be heavily dominated by politics.

As the backdrop for these proposals, it is important to understand that *every* disqualification motion before this Court for the past six years has been directed toward the same four justices-- former Chief Justice TAYLOR, Justice CORRIGAN, Justice YOUNG and myself-- justices who share a similar judicial perspective. We have in our state a constitutional system in which Justices must periodically submit themselves to the electoral process in order to retain their positions. The motions for disqualification had increasingly become a part of the political opposition to what until the most recent election had constituted the majority philosophy on this Court.

As the public, as well as the bench and bar, reviews these proposals, I raise the following questions:

(1) Will the integrity of the judicial process be enhanced by a procedure in which a justice who is the object of a disqualification motion is evaluated by another justice who has campaigned against that justice, or otherwise questioned that justice's overall philosophy? Is there an "appearance" problem under those circumstances in allowing a justice to compel the nonparticipation of a justice who has been elected by the people? At what point should a focus upon the circumstances of the justice who is the *object* of the disqualification motion be accompanied by a similar focus upon the circumstances of the justice *deciding* such motion?

(2) Will the integrity of the judicial process be enhanced by a procedure in which a justice who is the object of a disqualification motion by a particular party or attorney is evaluated by another justice who has benefitted from political support from that party or attorney? Is there an "appearance" problem under those circumstances in allowing a justice to compel the nonparticipation of a justice who has been elected by the people? At what point should a focus upon the circumstances of the justice who is the *object* of the disqualification motion be accompanied by a similar focus upon the circumstances of the justice *deciding* such motion?

(3) Will the integrity of the judicial process be enhanced by a procedure in which a justice who is the object of a disqualification motion is evaluated by another justice who has benefitted from political support from groups or organizations that might be advantaged by a justice's nonparticipation in a case? Is there an "appearance" problem in allowing a justice to compel the nonparticipation of a justice who has been elected by the people? At what point should a focus upon the circumstances of the justice who is the

object of the disqualification motion be accompanied by a similar focus upon the circumstances of the justice *deciding* such motion?

(4) Will disqualification motions be incentivized, and the number of such motions be substantially increased, by a procedure in which decisions are no longer made by the justice who is the object of the disqualification motion but by the Court as a whole under circumstances identified in the previous three questions?

(5) Should disqualification determinations by this Court be triggered only by motions from parties or attorneys or, in the interests of consistency and uniformity and to avoid different standards being applied to different justices, must justices themselves be allowed to initiate such motions?

(6) Should disqualification decisions be undertaken only by public votes of this Court, following debate and discussion at regularly scheduled administrative conferences, in order to ensure that the people are allowed to scrutinize decisions by which justices that they have elected to this Court are denied the ability to participate in a case?

(7) Is there constitutional authority, as some justices seem to believe, to replace a disqualified justice with a person who has not been elected to this Court? If so, how is a replacement justice to be determined?

(8) In addition to the interests of businesses, labor unions, public policy groups, and individual litigants in the decisions of this Court, to what extent should conceivable interests of lawyers be cognizable in the process of judicial disqualification, e.g., in terms of conceivable interests in the growth of litigation and the recognition of new claims and causes of action?

(9) Should the fact that a party or an attorney has made contributions for or against a justice, by itself, constitute grounds for disqualification? If Justice A is disqualified on such grounds, should Justice B be disqualified because he or she did *not* receive such a contribution or because his or her judicial opponent *did* receive such a contribution? Even if Justice B should not be disqualified, should he or she be allowed to participate in deciding a disqualification motion against Justice A?

(10) If proposed changes in the disqualification procedure are adopted, does this counsel for or against the adoption of an "appearance of impropriety" standard to replace the current "actual impropriety" standard for determining when the disqualification of

a justice is warranted?

Staff Comment: These three proposals would establish specific rules for disqualification of Supreme Court justices. The proposals vary considerably with regard to the procedure for disqualification, the grounds for determining whether disqualification is warranted, and the ability to review another justice's decision to recuse.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-04. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 18, 2009

Clerk